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Supreme Court, U.S.
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Nos. 05-1645 & 06-11

In the Supreme Court of the United States

05-1645

CAROLINE WALLACE and EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., et al.,
Respondents.

06-11

KAREN LECLERC, et al.,
Petitioners,

v.

DANIEL E. WEBB, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Constitution requires the States to license as attorneys non-immigrant aliens holding short-term visas.

2. Whether the Supremacy Clause of the Constitution preempts the authority of the States to control and to regulate the practice of law in their jurisdictions.

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STATEMENT OF THE CASE

The appeal that the Fifth Circuit consolidated involves two lawsuits from the United States District Court for the Eastern District of Louisiana.[1] The petitioners in those cases assert that Rule XVII of Louisiana's Rules governing Admission to the Bar of the State of Louisiana (the "Bar Admission Rules") violates the Equal Protection Clause and the Supremacy Clause of the Constitution of the United States.

The petitioners in the *Wallace* Action allege that they are citizens of the United Kingdom living in the United States pursuant to short-term or "temporary" visas. At the time they filed their complaint, Ms. Maw alleged she was admitted to the United States under an F1 student visa and Ms. Wallace asserted that she held an H-1B visa. Ms. Wallace states that she works as a paralegal in Louisiana. She further contends that in June of 2002 she understood that the Supreme Court of Louisiana and/or the Bar Admissions Officials granted her application to take Louisiana's bar examination. She, however, states that she received no "written confirmation" to that effect. Ms. Maw alleges that Louisiana's bar denied her application due to her temporary visa status. Neither Ms. Wallace nor Ms. Maw contend that they appealed to the Supreme Court of Louisiana the alleged adverse determinations of their applications.

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[1] They are *LeClerc, et al. v. Webb, et al.*, No. 03-664A (the "*LeClerc* Action") and *Wallace, et al. v. Calogero, et al.*, No. 03-1245L (the "*Wallace* Action"). The respondents submit this opposition to the petition filed by the plaintiffs in the *Wallace* Action and to the petition filed by the plaintiffs in the *LeClerc* Action, which have been consolidated by this Court.

The petitioners in the *LeClerc* Action allege that they are foreign nationals in the United States under J, F and L visas. Those visas permit "temporary" admission to the United States. Ms. LeClerc, Mr. Jarry and Ms. Boulord assert that they are citizens of France. While they seek admission to Louisiana's bar, they did not allege that they applied to take Louisiana's bar examination before filing their complaint in the district court. Ms. Affleck alleges that she is a citizen of Canada and that she obtained admission to the United States pursuant to an L-2 spousal visa. She avers that she holds a law degree from a university in Canada. Ms. Affleck asserts that she sought from Louisiana's bar an education equivalency determination and that the Committee on Bar Admissions denied her application because she is not an immigrant alien. Ms. Affleck does not allege that she appealed to the Supreme Court of Louisiana per the Bar Admission Rules.

The respondents are the Chief Justice[2] and Associate Justices of the Supreme Court of Louisiana (the "Justices"). The petitioners sued the Justices in their official capacities. The petitioners also sued Messrs. Webb and Philips in their official capacities as Chairman and Vice-Chairman of Louisiana's Committee on Bar Admissions (the "Bar Admissions Officials").

The Constitution of Louisiana grants the Justices the exclusive authority to promulgate and to interpret the Bar Admission Rules. The Justices hear and decide appeals of decisions concerning applications to Louisiana's bar.[3] The

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[2] Chief Justice Pascal F. Calogero is not a respondent in the *LeClerc* Action. He is a respondent in the *Wallace* Action.

[3] Bar Admission Rules, Rule XVII § 9.

Bar Admissions Officials administer the Bar Admission Rules pursuant to a specific grant of authority from the Supreme Court of Louisiana.[4]

SUMMARY OF ARGUMENT

This Court has never held that the Constitution requires a State to license as an attorney a nonimmigrant alien. This Court has never held that the laws of the States that simply affect the holders of temporary visas are subject to the standard of strict scrutiny review. The majority of the Panel of the Fifth Circuit correctly rejected the petitioners' contentions. The Fifth Circuit rightly denied en banc consideration of the case.

The petitioners propose that this Court expand the Equal Protection Clause of the Constitution to compel the Supreme Court of Louisiana to permit them to apply for law licenses in the State of Louisiana. The jurisprudence of the Court does not support the petitioners' request. Louisiana -- like the many other States that have similar statutes, rules and regulations that affect nonimmigrant aliens -- is entitled to decide whether to offer short-term visa holders the privilege of practicing law that it offers citizens and immigrant aliens. Rule XVII of the Bar Admissions Rules does not burden a fundamental right or target a suspect class. The Fifth Circuit's decision does not conflict with this Court's precedents or the jurisprudence of the other Circuits. Rule XVII does not offend the Equal Protection Clause of the Constitution.

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[4] Bar Admission Rules, Rule XVII § 1.

Additionally, Rule XVII is consistent with the Supremacy Clause of the Constitution. The Bar Admission Rules reflect Louisiana's proper exercise of its police power. The Congress has not preempted attorney licensing, regulation, discipline or oversight. Moreover, the petitioners do not identify any conflict between the Bar Admission Rules and the laws of the United States.

REASONS FOR DENYING THE PETITIONS

A. The Bar Admission Rules are Consistent with the Equal Protection Clause of the Constitution.

The petitioners' situations are both factually and legally distinct from those of immigrant aliens and citizens. Those distinctions doom their claims.

The petitioners in the *LeClerc* Action and in the *Wallace* Action are citizens of France, Canada and the United Kingdom. They are nonimmigrant aliens in the United States under short-term or "temporary" visas.[5] In short, the petitioners are nonresident aliens.[6] The petitioners allege that

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[5] At the time they filed suit, Ms. Maw held an F1 student visa and Ms. Wallace had an H-1B visa (for persons "temporarily" in the United States). 8 U.S.C. § 1101(a)(15) (F) & (H); 8 C.F.R. § 214.2(h). In the *LeClerc* Action, Ms. LeClerc, Mr. Jarry and Ms. Boulord held "J" visas. Ms. Affleck had an L-2 visa. Like "F" and "H" visas, "J" and "L" visas are "temporary" visas.

[6] The petitioners now describe themselves as "nonpermanent resident aliens," presumably to liken themselves to the plaintiff in *In re Griffiths*, 413 U.S. 717 (1973). That creative self-description lacks foundation. This Court has described short-term visa holders (like the petitioners) as "nonimmigrant" or "nonresident aliens."

they hold licenses to practice law in other nations and/or are graduates of foreign law schools.

According to the terms of their respective visas, the petitioners represent that they have residences in foreign countries that they have "no intention of abandoning." 8 U.S.C. §§ 1101(a)(15)(F), (H) & (J). The visas that the petitioners hold impose upon them specific terms and

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E.g., *Nyquist v. Mauclet*, 432 U.S. 1, 4 (1977) (reasoning that because the challenged statute did not apply to nonimmigrant aliens, "such as those here on [F] student visas," the law was "of practical significance only to resident aliens."). The Circuit Courts use the same identification. *E.g.*, *Ahmed v. Univ. of Toledo*, 822 F.2d 26, 26 (6th Cir. 1987) (describing as "nonresident aliens" international students living in the United States under student visas). Similarly, federal statutes and regulations generally describe visa holders as "nonresident aliens." *E.g.*, 26 U.S.C. § 7701(b)(3); 26 C.F.R. § 1.1441-1(c)(3)(ii); 26 C.F.R. § 301.7701(b)-1. While the petitioners live in the United States for a short time, their *foreign residences* -- that they affirm they have "no intention of abandoning"-- places them in the category of nonresident aliens. The district court in the *LeClerc* Action correctly characterized the petitioners as "nonimmigrant" or "nonresident aliens." Indeed, in their filings in the district court, the petitioners in the *LeClerc* Action accurately described themselves as "nonresident aliens." The website of the United States Citizenship and Immigration Services defines "Resident Alien" as applying to three alien categories, *none of which include nonimmigrant aliens like the petitioners*. *See* http://uscis.gov/graphics/glossary.htm (defining "Resident Alien" as permanent resident aliens, conditional [permanent resident] aliens and returning [permanent] resident aliens). The petitioners are *not* resident aliens.

requirements.[7] A violation of the terms of the visas makes the nonimmigrant alien deportable.[8] In addition, other circumstances beyond a visa holder's control -- including loss of employment or enrollment in an educational program -- requires a nonresident alien promptly to depart the United States.[9] The petitioners' visas are "temporary" by design and definition.[10]

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[7] *See* 8 U.S.C. § 1101(a)(15); 8 CFR § 241.2.

[8] 8 U.S.C. §§ 1184 & 1227. *See Omagah v. Ashcroft*, 288 F.3d 254, 257-58 (5th Cir. 2002) (recognizing the discretion of the Attorney General in the procedures of deportation); *Khano v. I.N.S.*, 999 F.2d 1203, 1207 (7th Cir. 1993) (observing that Section 241(a)(9) of the Act empowers the INS, on behalf of the Attorney General, to deport those nonimmigrants who fail to maintain the conditions attached to their nonimmigrant status while in the United States).

[9] 8 C.F.R. § 214.1(a)(3) (requiring nonimmigrant visa holders to depart the United States at the end of their visa's "period of admission" or the end of their compliance with the visa's terms); 8 C.F.R. § 214.2 (setting forth requirements and terms of F, H, J and L nonimmigrant visas).

With regard to the persons that hold visas that permit them to work, when the nonimmigrant alien's employment ends through termination, lay-off or his/her employer's bankruptcy, the visa holder must promptly depart the United States. Indeed, because work visas are position/employer-specific, the holder of this visa has a precarious attachment to a specific job and lacks the employment mobility that citizens and immigrant aliens enjoy.

[10] 8 U.S.C. §§ 1101(a)(15)(F), (H), (J) & (L).

Unlike the petitioners, immigrant aliens have rights and responsibilities very similar to those of citizens of the United States. The government may not deport immigrant aliens. They have the right to reside in the United States on a permanent basis. 8 U.S.C. § 1101(a)(20). In addition, they may serve in the military[11] and persons may not discriminate against them in employment.[12] Immigrant aliens enjoy entitlements to public welfare benefits.[13] They pay taxes on the same basis as citizens.[14] The United States may conscript them.[15]

In contrast, visa holders, as nonimmigrant aliens, have far fewer rights and responsibilities than citizens or immigrant aliens. For example, short-term visa holders do not pay taxes

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[11] 10 U.S.C. § 504.

[12] 8 U.S.C. § 1324b(a)(3).

[13] *See Graham v. Richardson*, 403 U.S. 365 (1971). Unlike citizens, however, immigrant aliens may not vote, hold public office or engage in certain occupations. *See Foley v. Connelie*, 435 U.S. 291 (1978) (the exclusion of resident aliens from the state police does not offend the Equal Protection Clause); *Ambach v. Norwick*, 441 U.S. 68 (upholding New York's law that barred from certification school teachers that are not citizens); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (The Equal Protection Clause does not prohibit California from excluding immigrant aliens from employment as probation officers).

[14] Resident or immigrant aliens pay taxes on income from all sources within or outside the United States. *See* IRS Publication 519, U.S. Tax Guide for Aliens, Chapter 2, p. 11 (2005).

[15] 50 App. U.S.C. § 453.

like citizens or resident aliens[16] and the United States may not conscript them into military service.[17] Temporary visa holders, as nonimmigrant aliens, do *not* enjoy the same rights as citizens and immigrant aliens. For example, they may not enlist in the military.[18] They have strict limitations on their ability to work in the United States[19] and they have no entitlement to public welfare benefits. While the Congress has protected immigrant or resident aliens from discrimination in employment, it generally has not extended those protections to visa holders or other nonimmigrant aliens.[20] Further, nonimmigrant aliens have fewer opportunities to own real estate in the United States[21] and do not possess the right to remain permanently in the United States.[22] In sum, visa

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[16] Under the federal tax code, nonimmigrant or "nonresident" aliens only pay taxes on the income that they receive from sources in the United States. *See* 26 U.S.C. § 1441; IRS Publication 519, U.S. Tax Guide for Aliens, Chapter 2, p. 11 (2005).

[17] 50 App. U.S.C. § 453.

[18] 10 U.S.C. § 504. At the time of the lower courts' rulings, 10 U.S.C. §§ 3253 & 8253 addressed this limitation.

[19] 8 C.F.R. § 214.2(j) & (f) (imposing restrictions and limitations on the ability of F1 and J visa holders to work while in the United States); 8 C.F.R. § 214.2(l) (declaring that L-2 visa holders may not accept employment "unless he or she has been granted employment authorization").

[20] 8 U.S.C. § 1324b(a)(3).

[21] 30 U.S.C. § 22. The States similarly place limits upon or prohibit altogether ownership of real estate by nonimmigrant aliens.

[22] 8 U.S.C. § 1101(a)(20).

holders remain in the United States at the discretion of the Attorney General.[23]

The States, like the federal government, may afford nonimmigrant aliens rights distinctly different from those granted citizens and resident aliens. For example, certain of the States prohibit altogether or place limits upon the ability of nonimmigrant aliens to own real estate.[24] Certain of the States provide unemployment compensation benefits to citizens and immigrant aliens but not to visa holders.[25] Certain of the States allow citizens and resident aliens -- but not visa holders -- to attend public universities on a tuition-free basis.[26] Certain of the States offer only citizens and resident aliens -- but not visa holders -- licenses to practice

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[23] 8 U.S.C. § 1184.

[24] *E.g.*, IA. Stat. Ann. § 9I.1 (prohibiting visa holders and other nonimmigrant aliens from purchasing or otherwise acquiring agricultural land within Iowa's borders). Should a person's status change to that of a nonresident alien, he/she is required to divest him or herself of all rights, title and interest in the real property. IA. Stat. Ann. § 9I.6.

[25] *See Zapata v. Levine*, 50 A.D.2d 681, 682 (N.Y. App. Div. 1975); *Duenas-Rodriguez v. Indus. Comm'n*, 606 P.2d 437, 438 n.3 (Colo. 1980) (citing Colo. Rev. Stat. § 8-73-107(7)). The court in *Duenas-Rodriguez* observed that the "courts have consistently held that aliens who enter the United States on nonimmigrant visas and aliens who enter illegally have no constitutional right to work." *Id.* at 439 (citations omitted).

[26] *See Carlson v. Reed*, 249 F.3d 876, 883 (9th Cir. 2001) (rejecting an equal protection challenge to California's rule that grants only immigrant aliens and citizens admission tuition-free to California's universities).

medicine and dentistry.[27] In addition, the States that adopt the federal income tax scheme treat temporary visa holders differently from citizens and resident aliens in tax matters.

Like the Congress and the legislatures of the States, the Court has recognized the basic distinctions among immigrant aliens and other groups of aliens, including visa holders. In *Mathews v. Diaz*, 426 U.S. 67, 78 (1976), the Court observed that, although all persons enjoy the protections of the Constitution, that "does not lead to the further conclusion that all aliens are entitled to enjoy all of the advantages of citizenship."[28] Indeed, there is no basis for a "conclusion that all aliens must be placed in a single, homogeneous legal classification."[29] This Court further recognizes that the extent of an alien's "ties to this country" determines whether the government may treat a particular class of aliens more or less favorably than other categories of aliens.[30] In *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), the Court noted that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his

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[27] *E.g.*, N.Y. Educ. Law § 6524 (applicant for New York physician's license must be a citizen "or an alien lawfully admitted for permanent residence in the United States"); La. R.S. 37:761(A)(1) (dental license applicant must be "a citizen or a permanent resident of the United States").

[28] 426 U. S. 67, 78 (1976).

[29] 426 U.S. at 78. Importantly, this Court made these pronouncements **after** it decided *In re Griffiths*, 413 U.S. 717 (1973). This Court has not indicated that *Griffiths* applies to nonresident aliens or that the States must accord nonresident aliens the same opportunities as resident or immigrant aliens.

[30] 426 U.S. at 79 n.13.

constitutional status changes accordingly." In *Foley v. Connelie*, 435 U.S. 291, 294 (1978), the Court remarked that "we have never suggested that [state legislation that imposes restraints on aliens] is inherently invalid, nor have we held that all limitations on aliens are suspect.").

The Circuits have described immigrant aliens as the "most favored category of aliens admitted to the United States."[31] And the Fifth Circuit aptly recognized the factual and legal distinctions that surround different groups of aliens and the nature of their respective ties to the United States. The petitioners are simply wrong in asserting that they are indistinguishable from immigrant aliens.

Strict scrutiny does not apply to the Bar Admission Rules. Under the precedents of this Court, the courts employ the measure of strict scrutiny only when the government has created classifications that burden a fundamental right[32] or that target a "suspect" class of persons.[33] The courts review all other classifications by the government pursuant to the rational basis standard -- with a "heavy presumption of

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[31] In *Kim v. Ziglar*, 276 F.3d 523, 528 (9th Cir. 2002), the Ninth Circuit commented that immigrant aliens "[u]nlike almost all other aliens" are entitled to apply for citizenship, to work in the United States "without limitation," and to reside permanently in the United States. (This Court reversed the Ninth Circuit's ruling, holding that the Due Process Clause does not forbid the detention of immigrant aliens without a bail hearing. *Demore v. Kim*, 538 U.S. 510 (2003).)

[32] The petitioners no longer contend that they have a fundamental right to practice law.

[33] *Heller v. Doe*, 509 U.S. 312, 319 (1993).

validity."[34] That heavy presumption of validity requires deference to Rule XVII because it neither burdens a fundamental right nor targets a suspect class.[35]

The Bar Admission Rules do not target a suspect class. As the Panel of the Fifth Circuit correctly observed, this Court has not held that nonimmigrant aliens constitute a suspect class. This Court has not ruled that the States must treat all aliens identically, without regard to their situations. Additionally, this Court has not decided that a classification by a State that affects only nonimmigrant aliens faces strict scrutiny by the judiciary. When this Court has reviewed a classification like the one in the Bar Admission Rules about which the petitioners complain, it has applied the rational basis level of review. *E.g., Terrace v. Thompson*, 263 U.S. 197 (1923) (ordinary review of a statute in Washington that prohibited aliens who have not expressed an intention to become citizens from owning real estate). That standard -- rather than strict scrutiny -- governs review of Rule XVII.

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[34] *Id.* at 319.

[35] While the rules of other States are not directly at issue, the respondents note that jurisdictions other than Louisiana have similar or identical bar admission requirements. For example, Rhode Island limits bar admission to citizens and resident aliens with a green card. New Hampshire limits bar admission to "domiciliaries of the United States." Temporary visas prevent nonimmigrant aliens from establishing a domicile in the United States. *See Carlson*, 249 F.3d at 880 (citing *Elkins v. Moreno*, 435 U.S. 647, 655 (1978)). The bar admission rules of those and other states – like Louisiana's Bar Admission Rules – are wholly consistent with *Griffiths* and the Equal Protection Clause.

The petitioners err in saying that the panel's decision conflicts with this Court's decision in *In re Griffiths*. That case arose in a very different factual and legal context. A Connecticut statute prohibited the plaintiff -- an immigrant alien married to a citizen and eligible for naturalization -- from admission to Connecticut's bar.[36] Connecticut's statute -- that permitted only citizens to obtain law licenses -- operated as a "total exclusion"[37] of "all aliens from the practice of law."[38] This Court invalidated Connecticut's "wholesale ban" on alien bar admission[39] after observing the significant similarities between citizens and resident aliens.[40] Those observations, including service in the Armed Forces, do *not* apply to short-term visa holders.

Neither the Bar Admission Rules nor the petitioners' situations bear significant similarity to the circumstances in *Griffiths*. The petitioners are not immigrant or resident aliens. They are in the United States pursuant to short-term visas. Rule XVII does not impose a "citizens-only" requirement and expressly permits immigrant aliens to obtain

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[36] 413 U.S. at 718.

[37] 413 U.S. at 719.

[38] 413 U. S. at 727.

[39] 413 U.S. at 725. Importantly, the Court discussed the oath that immigrant aliens take upon induction in the Armed Services. Visa holders, however, may not serve in the military. 10 U.S.C. § 504. The Court did not address the validity of a rule that applies only to nonimmigrant aliens.

[40] 413 U.S. at 722.

law licenses. Rule XVII is not a "wholesale ban" and does not "totally exclud[e] aliens from the practice of law."

The petitioners also overreach when they say that nothing in *Griffiths* suggests the decision is limited to the status of the plaintiff. That contention ignores the Court's holding, reasoning and terminology in *Griffiths*. This Court took pains to discuss the "wholesale ban" on alien admission in that case, which "totally excluded" all aliens from admission to the bar. Had the Court desired to address all groups of aliens, it would have described and discussed "aliens" generally – rather than "resident aliens."[41]

The similarities between citizens and immigrant aliens that this Court discussed in *Griffiths* – such as tax liability and military service – likewise distinguish nonimmigrant aliens from that decision's reasoning and holding. Resident or immigrant aliens have the same tax and selective service obligations as citizens. Nonimmigrant aliens do not. Immigrant aliens have the right to remain permanently in the United States. Nonimmigrant aliens do not. Nonimmigrant aliens are not like citizens and resident aliens in many other respects. *Griffiths* simply does not apply to short-term visa holders. Indeed, this Court's subsequent explanation of its decisions in *Griffiths* and *Graham* (as well as other opinions upon which the petitioners rely) confirms that the Court made its decisions on the principle that the state statutes at issue were "inconsistent with the congressional determination to

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[41] This Court employed the words "resident alien" throughout its opinion, particularly in its holding that the categorical exclusion in that case "unconstitutionally discriminates against resident aliens." 413 U.S. at 718. Without justification, the petitioners now seek to stretch the Court's opinion to include temporary visa holders.

admit the alien to *permanent residence*." *Foley v. Connelie*, 435 at 295 (emphasis added.) The United States has *not* granted the petitioners, as temporary visa holders, permanent residence.

The petitioners wrongly state that the Fifth Circuit's decision conflicts with the Fourth Circuit's opinion in *Moreno v. University of Maryland*, 645 F.2d 217 (1981) (per curiam). The panel's per curiam opinion in *Moreno* summarily affirmed the district court's ruling that the policy at issue, that concerned uniquely-situated G-4 visa holders, was constitutionally infirm for multiple reasons. *Id.* at 218 (noting that G-4 visa holders, "[u]nlike most nonimmigrant aliens," could reside permanently in the United States and could establish domicile in Maryland). This Court recognized the "significant" distinction between those plaintiffs and other categories of nonimmigrants. *Toll v. Moreno*, 458 U.S. 1, 14 & n. 20 (1982) (citing "significant" contrast between G-4 visas and F, H and other visas); *Moreno v. Toll*, 489 F.Supp. 658, 666 (D. Md. 1980) (noting "particular" circumstances of G-4 nonimmigrant aliens' ability to remain and establish domicile in the United States). On review, this Court did not address the contention under the Equal Protection Clause. *Toll*, 458 U.S. at 10.[42]

The petitioners fail to identify a conflict with the Fourth Circuit's per curiam decision in *Moreno*. The Fourth Circuit's ruling, unlike the thorough ruling by the Fifth Circuit, does not address the petitioners' dissimilar legal

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[42] Notably, this Court in *Plyler v. Doe* declined to apply the district court's rationale for its equal protection ruling: that a state statute affecting "only aliens" is subject to strict scrutiny, 457 U.S. 202, 223 (1982).

status or their temporary visas. There is no conflict and no basis for certiorari review.

Rule XVII does not apply to aliens as a class. The rule only affects aliens with temporary connections to Louisiana and to the United States.[43] This Court has never held that the courts must invoke strict scrutiny analysis to this sort of classification. The district court in the *LeClerc* Action and the Panel of the Fifth Circuit correctly recognized that.

The petitioners also wrongly place reliance upon *Graham v. Richardson*. The aliens in that case, like the plaintiff in *Griffiths*, were resident aliens.[44] The laws of Arizona denied public welfare benefits to resident aliens and other aliens "as a class."[45] This Court recognized that the statute denied aliens "the necessities of life, including food, clothing and shelter," and, therefore, denied entrance and abode to aliens

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[43] Though the respondents need not rely on this authority, it is worth noting that the Congress has authorized the States to decide the eligibility of various categories of aliens (except, in general, aliens admitted for permanent residence) for public benefits. 8 U.S.C. §1622. Among other things, public benefits include professional licenses. 8 U.S.C. §1621(c). The categories of excludable aliens include nonimmigrant aliens, like the petitioners. 8 U.S.C. §1622(a). The petitioners simply are wrong in arguing that the States have little or no power to classify among categories of aliens.

[44] 403 U.S. at 367.

[45] 403 U.S. at 371. *See Bernal v. Fainter*, 467 U.S. 216, 227 (1984) (striking down Texas' legislation that permitted only citizens to become notaries public because it imposed impermissible "wholesale ban" and "absolute and classwide exclusion" of all aliens, including the *immigrant alien* involved in the case).

who were "unable to live" without those basic necessities.[46] This Court struck down Arizona's citizens-only restriction.[47]

Rule XVII -- unlike the statutes in *Griffiths* and *Graham* -- does not impose a classwide exclusion of aliens. Rule XVII expressly permits immigrant aliens -- the most favored category of aliens -- to seek a license to practice law in Louisiana. Furthermore, Rule XVII does not deny aliens the basic necessities of life,[48] unlike the policies at issue in *Graham*, in *Plyler* and in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

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[46] 403 U.S. at 379-380. According to the petitioners' argument -- that *Griffiths* applies to nonimmigrant aliens -- *Graham* would likewise guarantee welfare benefits to immigrant *and* to nonimmigrant aliens. That, however, is not accurate. *E.g.*, *Soskin v. Reinertson*, 353 F.3d 1242, 1257 (10th Cir. 2004) (rejecting equal protection challenge to Colorado's limitation of Medicaid benefits to certain aliens but not to visa-holders). Long before the Congress recognized by statute the States' authority to offer benefits to certain sub-categories of aliens, the States exercised that authority. While the States may not deny welfare benefits to resident or immigrant aliens, the Constitution does not require the States to offer those benefits to persons, like the petitioners, in the United States pursuant to temporary nonimmigrant visas. Similarly, the Constitution does not require the States to grant law licenses to temporary visa holders.

[47] Again, this Court subsequently explained its reasoning and implicit rebuttal of petitioners' expansive reading of this Court's precedents: it was inconsistent to absolutely disallow employment opportunities or life's basic necessities to aliens who had been admitted for "permanent residence." *Foley*, 435 U.S. at 295.

[48] According to their allegations, Ms. Wallace and Ms. Maw currently work in the legal field.

The petitioners suggest that all persons extant in the United States are entitled to the same treatment, and that the States must afford all aliens the same opportunities. That is not (and never has been) the law. While the Fourteenth Amendment protects all persons in the United States, the Constitution does not guarantee identical treatment for all persons without regard to their situations. The petitioners propose an extraordinary expansion of constitutional law. That proposal has implications for a myriad of statutes, regulations and policies of the States.[49] *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (acknowledging that reluctance to enlarge the rights under the Equal Protection Clause flows, in part, from knowledge that each expansion results in invalidation of similar legislation).

Notably, the petitioners do not cite the Court to any decision of this Court that invokes the standard of strict scrutiny to a classification involving nonimmigrant aliens. Because the Bar Admission Rules do not infringe upon a fundamental right or target a suspect class, the Fifth Circuit correctly analyzed Rule XVII under the standard of rational basis review.

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[49] For instance, the Supreme Court of Louisiana may have to reevaluate its liberal policy of accepting applications from immigrant aliens that graduated from foreign law schools. In many jurisdictions, persons that graduated from foreign law schools may *not* seek a license to practice law. That is, in many jurisdictions bar applicants must graduate from ABA-approved law schools – all in the United States. In addition, state licensing and regulatory agencies – including state welfare and state homeland security departments – would face the impact of a ruling by the Court that the States may not treat short-term visa holders differently from citizens or immigrant aliens.

The Bar Admission Rules appropriately consider the petitioners' distinguishing characteristics: their transient status and inability to remain in this country indefinitely. As a matter of law, when a group possesses "distinguishing characteristics" relevant to interests under the State's authority to regulate, "a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-367 (2001) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Garrett*, 531 U.S. at 367. Rule XVII merely differentiates between persons with different situations, as do other statutes of the Congress and the legislatures of the States that affect nonimmigrant aliens. It is due a "strong presumption of validity."[50] The petitioners' distinguishing characteristics – their decisions to dwell in the United States as temporary visa holders – dictate rational basis review.

The Equal Protection Clause does not serve as a "license for courts to judge the wisdom, fairness, or logic of legislative choices."[51] Under the traditional level of review, a statute in question "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[52] Importantly, the State need not "articulate at any time the

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[50] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

[51] 508 U.S. at 313.

[52] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

purpose or rationale supporting its classification."[53] Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[54]

This Court has rejected equal protection challenges to legislation that advances some legitimate interest -- even when the law seems unwise or illogical, works to the disadvantage of a particular group or appears to have a tenuous rationale.[55] Moreover, a statute does not fail rational basis review merely because it "is not made with mathematical nicety or because in practice it results in some inequality."[56] Instead, the "classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[57]

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[53] *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

[54] *Beach Communications*, 508 U.S. at 315.

[55] *E.g., New Orleans v. Dukes*, 427 U.S. 297 (1976) (potential benefits to tourism justified classification favoring French Quarter pushcart vendors of certain longevity); *Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552 (1947) (possible efficiency and safety benefits of a closely knit pilotage system justified Louisiana's licensing scheme, which favored family and friends of current river boat pilots and disfavored unrelated persons).

[56] *Heller*, 509 U.S. at 321. This Court has warned that legislative choices are not "subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315.

[57] 509 U.S. at 320.

Rule XVII satisfies rational basis review. While the Justices are not obligated to articulate the purpose(s) or rationale(s) behind Rule XVII, the interests the Rule serves are plain: protection of the public, including the clients of Louisiana's attorneys. Louisiana's interests in regulating and policing licensed attorneys are legitimate, substantial and entirely appropriate.[58] Moreover, Louisiana's decision to offer bar admission to citizens and immigrant aliens – persons who have an expressed intent and *ability* to remain in the United States -- rationally relates to Louisiana's duty to monitor attorneys in Louisiana and, when necessary, to take action vis-à-vis the attorneys.[59] Contrary to the petitioners' assertions, there is nothing irrational about a decision not to grant law licenses to persons, unlike citizens and resident aliens, who exist in this country at the whim and discretion of

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[58] *See Southern Christian Leadership Conference v. Supreme Court of Louisiana*, 61 F. Supp.2d 499, 510 (E.D. La. 1999) (finding "legitimate" and "appropriate" the Supreme Court of Louisiana's concerns with client solicitation, the protection of the public and its ability to police licensed attorneys).

[59] The petitioners advance the flawed argument that their situations are no different than other persons who move to other States. But visa holders who leave the United States are beyond the reach of the judicial system. This is a very real concern for the defendants, the officials in Louisiana charged with overseeing the bar and deciding appropriate remedial action when clients or cases suffer as a result of neglect or malfeasance by an attorney. The petitioners' tenuous, temporary and conditional connection with the United States and the States, however, set them apart from the applicants who are immigrant aliens, as the appellate panel recognized.

others. The Supreme Court of Louisiana's system serves significant interests of the State of Louisiana.[60]

The Supreme Court of Louisiana is the sole authority over bar admission requirements, the ultimate adjudicator of attorney disciplinary complaints in Louisiana and the agency charged with remedying wrongs and omissions by Louisiana attorneys.[61] For example, when cases suffer from an attorney's neglect, ethical lapses or other problems, the Justices decide appropriate sanctions or other remedial action. The Justices should have the ability to determine whether transient persons should, in the interest of Louisiana's

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[60] Though the petitioners view Rule XVII as inefficient and question its design and effect, their disagreement does not make Rule XVII unconstitutional. *See Beach Communications*, 508 U.S. at 316 (the fact that a classification disadvantages some persons "or might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration") (citations omitted). This Court has cautioned against the judicial activism that the petitioners seek. *E.g., Heller*, 509 U.S. at 319 ("We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *See City of New Orleans*, 427 U.S. at 303 (explaining that "the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines").

[61] *See Dodson v. Spiliada Mar. Corp.*, 951 F.2d 40, 43 (5th Cir. 1992) (recognizing that the Supreme Court of Louisiana "has exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship.").

citizenry, hold licenses to practice law. The Supreme Court of Louisiana legitimately may decide that persons on short-term visas -- whose presence in the United States is temporary, has no guarantee and is beyond their control -- should not hold licenses to practice law in Louisiana. Indeed, should the United States force a visa holder (through no fault of his or her own) to leave the United States suddenly, the Supreme Court of Louisiana will bear the responsibility of remedying any resulting problems.[62] Louisiana has a substantial interest in ensuring that it can effectively rectify harm done by attorneys licensed in Louisiana through restitution and/or discipline.

There is no question that the petitioners seek an expansion of the Equal Protection Clause and this Court's precedent, as the district court in the *LeClerc* Action and the Fifth Circuit recognized. Indeed, a myriad of similar state statutes, rules, regulations and policies counter the petitioners' arguments. The Fifth Circuit appropriately resisted the petitioners' invitation.

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[62] Pursuant to the Homeland Security Act, the Congress split the functions of the INS into three bureaus in the Department of Homeland Security. As a result, the status of visa holders is now even more tenuous: "It is clear that when security considerations arise, BICE (Bureau of Immigration and Customs Enforcement) monitoring will override BCIS (Bureau of Citizenship and Immigration Services) conferral of benefits with regard to nonimmigrants. Thus, a nonimmigrant who fails to report a change of address according to the rules within 10 days, would come under the jurisdiction of the BICE and could be removed and barred further entry by the BICE regardless of the benefits conferred by the BCIS." Austin T. Fragomen, Jr. & Steven C. Bell, *H-1B Handbook*, p. vii (2003).

The petitioners identify no conflict with the precedent of this Court, as the Fifth Circuit discussed in a thorough opinion. The petitioners offer no valid reason for the Court to grant their petitions.

B. The Bar Admission Rules are Consistent with the Supremacy Clause

The district courts and the Fifth Circuit rejected the petitioners' claims under the Supremacy Clause. The courts correctly ruled that Congress has not preempted attorney licensing, oversight and discipline and that the Bar Admission Rules do not conflict with the laws of the United States. The petitioners present no reason to revisit that conclusion.

The Supreme Court of Louisiana promulgates the Bar Admission Rules, including Rule XVII, through its constitutional responsibility to license, to oversee, and to discipline members of the bar. That is an area that Louisiana, like other States, historically has regulated.

The legislation of a State runs afoul of the Supremacy Clause when it intrudes upon an area that the Congress has expressly preempted.[63] When the Congress has not occupied a particular field, the laws of the United States may preempt the laws of a State when the law of a State "conflicts" with the laws of the United States.[64] The analysis under the Supremacy Clause, however, "starts with the basic

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[63] *See Hillsborough County, Fl. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

[64] *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989).

assumption that Congress did not intend to displace state law."[65]

When a law of a State arises in an area that the States have traditionally regulated, the courts grant the regulation or law deference.[66] Consequently, the courts do not supercede the historic police powers of the States unless that is the "clear and manifest purpose of Congress."[67]

As in many states, the Supreme Court of Louisiana has exclusive authority over attorney licensing, admission and discipline. Louisiana has important interests in protecting the public, in policing Louisiana's attorneys, and in promoting the integrity and the public perception of Louisiana's bar and the judicial system. In addition, Louisiana has substantial interests in ensuring that it can effectively rectify harms, through restitution and/or discipline, that attorneys licensed in Louisiana cause. Through the Bar Admission Rules, the

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[65] *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). *See also ARC America Corp.*, 490 U.S. at 101 (a litigant that asserts preemption under the Supremacy Clause must overcome the presumption against preemption).

[66] *See Hillsborough County*, 471 U.S. at 715. *See also Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 687 (2d Cir. 1996) (observing that the presumption against preemption is "especially strong" in areas traditionally regulated by the States).

[67] *Cipollone*, 505 U.S. at 516; *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (the intent of Congress to supersede the laws of the States in areas traditionally occupied by the States must be "clear and manifest").

Supreme Court of Louisiana exercises the State's police power in the interests of public safety and protection.

The petitioners do not identify anything that suggests that the Congress intended to displace Louisiana's authority to make decisions about licensing legal professionals. The Fifth Circuit correctly recognized that. Indeed, the Immigration and Nationality Act specifically contemplates the States exercising their licensing functions.[68] The Congress has neither expressly nor impliedly superseded the role of the States in the area of bar admission -- and certainly has not done so with "clear and manifest intent."

Importantly, the petitioners do not point out any "actual conflict" between the Bar Admission Rules and the laws of the United States. That failure alone defeats their claim of preemption.

Even should a conflict exist, the Court should accord Bar Admission Rules substantial deference. They arise under Louisiana's police power and in an area that the State historically has regulated. Under this authority, many states decide to license only graduates of law schools in the United States or law schools approved by the American Bar Association.[69] The States make numerous other decisions

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[68] *E.g.*, 8 U.S.C. § 1184(i)(2)(A).

[69] Acceptance of the petitioners' argument under the Supremacy Clause would result in the courts striking the bar admission rules of many other states. Indeed, many states require ABA-approved legal educations as prerequisites to bar admission. That categorically excludes most or all of the petitioners, including Ms. Wallace notwithstanding her H visa, from bar admission in those states. Louisiana, however, considers foreign law school

concerning their licensing requirements. Those decisions – like Louisiana's decision to offer bar admission to graduates of foreign law schools but not to temporary inhabitants of the United States – are proper for the individual States to make. The Supreme Court of Louisiana has weighed competing considerations and made a sound decision regarding admissions to Louisiana's bar. Nothing in Rule XVII offends the Supremacy Clause.

The petitioners incorrectly assert that Rule XVII prevents H-1B visa holders from working in the legal field. Indeed, Ms. Wallace holds an H-1B visa and she works as a paralegal. The legal field includes a wide variety of work that does not require a license to practice law including work as a paralegal, factual or legal researcher, trial assistant and even work on pleadings and agreements that a licensed attorney submits.[70] By their own admissions, the petitioners are able to work within the legal community and the field of law.

The Fifth Circuit rightly followed this Court's decision in *DeCanas v. Bica*.[71] This Court in *DeCanas* reviewed a California statute that allowed employers to refuse to employ certain unlawful aliens when that employment had an adverse

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educations but offers bar admission to citizens and immigrant aliens – not temporary visa holders. Under the petitioners' argument, the rules of many other states conflict with federal law and are therefore unconstitutional.

[70] *See Southern Christian Leadership Conference*, 252 F.3d 781, 790 & n.6 (5th Cir. 2001).

[71] 424 U.S. 351 (1976). Tellingly, the plaintiffs in *DeCanas* did not assert a claim under the Equal Protection Clause.

effect on citizens and other aliens.[72] This Court reinforced that it had "never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."[73] This Court also cited the principle that the "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."[74] Reasoning that the analysis focused on the state's traditional authority over and regulation of employment, not the federal government's authority over immigration, this Court *reversed* the appellate court's ruling that California's law was unconstitutional.[75]

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[72] 424 U.S. at 352-53.

[73] 424 U.S. at 355.

[74] 424 U.S. at 356. Among California's reasons for the burden on alien workers were increases in unemployment, negative effects on wages and working conditions, and diminished effectiveness of labor unions.

[75] In *Carlson v. Reed*, the Ninth Circuit rejected a Supremacy Clause challenge to a California policy precluding nonimmigrant visa holders from obtaining free public university educations to which citizens and immigrant aliens were entitled. *See* 249 F.3d at 877. The appellate court observed that unlike other California residents, the plaintiff was distinguished by the terms of her nonimmigrant visa, which "expressly conditioned admission . . . on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." *Id.* at 879 (citations omitted). The appellate court concluded that Congress, not California, imposed the burden on the plaintiff when it issued the nonimmigrant visa. *See id.* at 881. In this matter, the petitioners' temporary, conditional stay in this country is similarly due to the action of Congress' immigration scheme, not the respondents' classification.

Rule XVII does not conflict with federal law. The Supreme Court of Louisiana, like its counterparts in other states, historically has exercised its broad authority over the attorney-client relationship, the regulation of Louisiana attorneys, and the criteria for admission to Louisiana's bar. Simply because Louisiana's exercise of its police power may impact a subcategory of aliens is not a basis for invalidation of the Bar Admission Rules. The Fifth Circuit correctly recognized Louisiana's exercise of its authority as "unquestionably permissible."

CONCLUSION

Because the petitions present no valid basis for this Court to grant them, the Court should deny the petitions for certiorari.

Respectfully submitted,

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